IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAUL SULGER,

Appellant,

vs.

B. H. POCHYLA,
JANE DOE POCHYLA, his wife,
THOMAS A. RYAN, and
JANE DOE RYAN, his wife,

Appellees.

No. 21,874

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEES

EDWARD E. DAVIS
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For the District of Arizona

JO ANN D. DIAMOS
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Attorneys for Appellees

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I.

JURISDICTIONAL STATEMENT OF FACTS

On May 17, 1966 a Notice of Filing of Petition for Removal from State Court to Federal Court, supported by Petition for Removal with attached copies of Summons and Complaint filed in the Superior Court of the State of Arizona, in and for the County of Cochise was filed by the United States Attorney of the District of Arizona on behalf of B. H. Pochyla and Thomas A. Ryan (Record on Appeal, item 95 docket en-

tries, 4 and 5. Hereinafter the Record on Appeal will be referred to as "RC", the number following will refer to the page; the parties will be referred to as appellant and appellees)

The petition for removal was verified by appellant B. H. Pochyla and Assistant U. S. Attorney Diamos and stated the three claims for relief in the Complaint were based upon appellees B. H. Pochyla and Thomas A. Ryan as officers of the United States Army having caused affidavits to be filed before the Arizona Corporation Commission to have appellant's public license for public limousine and taxi cab revoked; that at all times mentioned in the Complaint they were duly commissioned officers of the United States and were acting under color of their offices as Commander and Staff Judge Advocate of Fort Huachuca and in the performance of their duties brought said action to revoke appellant's said license (RC 5).

The Notice of the Petition for Removal and the Petition for Removal was sent to the Clerk of the Superior Court of the State of Arizona and for the County of Cochise and to Appellant (RC 4).

The Complaint alleged in the First Claim for Relief that appellees had conspired to coerce, defraud and defame appellant by means of false and fraudulent statements and thereby to injure appellant in his business. The Second Claim for Relief realleged all the allegations of the First Claim by reference and then alleged appellant had not authorized the statements to be published and alleges an invasion of his right to privacy; the Third Claim for Relief realleges all the allegations of the First Claim for Relief by reference and alleges these statements exposed appellant to public ridicule, and that these were false and damaged appellant's reputation; and that these statements were made maliciously, deliberately and with wilful intent to injure plaintiff (RC 10-17).

On May 20, 1966, appellees filed their answer which denied all the allegations except they admitted appellant was a common carrier and they admitted the quoted statement in

Paragraph Six was made in a pleading to the Arizona Corporation Commission and alleged the affirmative defense that appellees B. H. Pochyla and Thomas A. Ryan were acting in the discharge of their official duties (RC 18).

On May 23, 1966 appellant filed a Motion to Remand on the grounds the United States District Court was devoid of jurisdiction as set out in the Memorandum of Points and Authorities which set out that 28 U.S.C.A. 1442a does not cover slanderous statements and further that 28 U.S.C.A. 1442a does not cover the wives of the appellees (RC 22).

On June 7, 1966, appellees filed a Memorandum in Opposition supported by the separate Affidavits of each of the appellees (RC 28).

On June 13, 1966 the Court heard the Motion to Remand and it was denied (RC 96).

On July 8, 1966 appellees filed a Motion for Summary Judgment supported by the affidavits of Colonel Robert P. Johnson and Major General L. G. Cagwin and incorporated by reference the four Affidavits of appellees filed with the Memorandum in Opposition to the Motion to Remand (RC 47).

On August 4, 1966 appellant filed a Response to Defendants' Motion for Summary Judgment (RC 59).

On August 8, 1966 the Court heard argument on the Motion for Summary Judgment and took the matter under advisement (RC 96).

On August 10, 1966 the Clerk entered the Court's written memorandum of its ruling that the Motion for Summary Judgment was denied (RC 96).

On October 3, 1966 the depositions of Rex Thornton and William Stone were filed (RC 67 and 68).

On December 13, 1966 appellant's present counsel entered an appearance (RC 96).

On January 16, 1967 appellees filed a second Motion for Summary Judgment (RC 76).

On January 17, 1967 the Court entered an Order Nunc

Pro Tunc granting the first Motion for Summary Judgment as of August 10, 1966 and directing the Clerk to enter judgment for appellees (RC 96 and 97).

On January 17, 1967 the Clerk entered Judgment for appellees (RC 82).

On March 16, 1967 appellant filed Notice of Appeal (RC 84).

This Court has jurisdiction pursuant to the provisions of 28 U.S.C.A. §1291.

II.

STATEMENT OF FACTS

(Since the Complaint and Answer of the case herein are not verified they do not constitute facts of the case for the reason that an adverse party to a Motion for Summary Judgment "may not rest upon the mere allegations or denials of his pleading." Rule 56 (e) Federal Rules of Civil Procedure, Title 28, U.S.C.A.)

Appellee B. H. Pochyla was a Major General of the United States Army from September 1, 1963 through June 1966 and was Commanding General, United States Army Electronic Proving Ground, Fort Huachuca, Arizona (RC 32 and 53).

Appellee Thomas A. Ryan was a Colonel of the Judge Advocate General's Corps, United States Army, and was Staff Judge Advocate of the United States Army Electronic Proving Ground, Fort Huachuca, Arizona, from June 11, 1962 through June, 1966 (RC 37 and 57).

Reports were made to General Pochyla, appellee, and after an investigation and conferences with appellant, sworn affidavits were obtained of Army personnel who travelled in the appellant's limousine on Government travel requisitions to or from the Tucson International Airport (RC 32-33 and 37-38). The affidavits were forwarded to the Arizona Cor-

poration Commission by Colonel Ryan, appellee, at the direction of General Pochyla, appellee (RC 33 and 38). An Order to Show Cause was issued by the Arizona Corporation Commision for a hearing on February 11, 1965 (RC 38 and 33). General Pochyla, appellee, was subpoenaed at appellant's request, and General Pochyla, appellee, asked Colonel Ryan, appellee, to accompanying him to the hearing as Staff Judge Advocate (RC 38 and 33).

The Arizona Corporation Commission took the matter under advisement on February 11, 1965, after the hearing (RC 34 and 38).

A soldier, going to Colonel Ryan, appellee, for advice after the appellant had filed criminal charges on him, brought about an investigation and further affidavits were obtained, and on April 8, 1965, a petition to reopen the hearing was filed by Colonel Ryan, appellee, at appellee General Pochyla's direction (RC 38-39 and 34-35).

Because a direct interest of Department of the Army was involved, the Litigation Division, Communications, Transportation and Utilities Branch, Office of The Judge Advocate General, as represented by Mr. John Faulk, Attorney, filed a Petition for Leave to Intervene on Behalf of the Department of the Army and the Leave to Intervene was subsequently granted by the Arizona Corporation Commission (RC 41 and 35).

A hearing was held on June 7, 8 and 30, 1965, by the Arizona Corporation Commission at Sierra Vista, Arizona (RC 35 and 38-42).

On August 30, 1965, the Arizona Corporation Commission rendering its Opinion and Order No. 37988, cancelling appellant's Certificate No. 7694—Docket NC 17463 cancelled (RC 41-42).

Appellant filed an appeal in State Court and the Superior Court did not set aside the cancellation order (RC 42-43).

Appellee B. H. Pochyla stated:

"Any and all statements that I have ever made concerning Mr. Sulger, his cab drivers and his business were made by me in my official capacity as an officer of the United States Army acting under color and authority of my office as Commanding General, Fort Huachuca, Arizona." (RC 35).

Appellee Thomas A. Ryan stated:

"Any and all statements that I have ever made concerning Mr. Sulger, his cab drivers and his business were made during the investigation, preparation, hearings and trial of the matters related herein, and in my official capacity as Staff Judge Advocate, Fort Huachuca, Arizona and as an officer of the United States Army acting under color and authority of such office and pursuant to directions of my commanding officer, Major General B. H. Pochyla, Commanding General, Fort Huachuca, Arizona." RC 44).

Both appellee Constance Pochyla and appellee Katherine Ryan stated:

"That I have never been involved in any matters relating to Mr. Sulger and have no knowledge concerning the facts involved or alleged by Mr. Sulger." (RC 45 and 46).

Appellant, some 25 days after receipt of the Motion for Summary Judgment, after having obtained an extension of time, filed the Affidavits of William Stone (RC 62), Rex Thornton (RC 63) and Frank Lewis (RC 64-65). There was no affidavit by appellant.

The latter affidavit alleged that Frank Lewis had not had sufficient time to take depositions and develop information concerning the extent of the immunity covering the appellees (RC 64-65).

William Stone in the affidavit filed by appellant alleged:

"That sometime during the latter part of May, 1965, your affiant was engaged in a conversation with Colonel Thomas A. Ryan at Sierra Vista, Arizona; that during

the foregoing mentioned conversation Colonel Thomas A. Ryan stated that 'we' are going to put Paul Sulger out of business because Mr. Sulger and his wife were not morally fit to conduct business; that your affiant asked Colonel Thomas A. Ryan who he meant by 'we' and Colonel Thomas A. Ryan informed your affiant that he meant General Benjamin H. Pochyla and himself; that Colonel Thomas A. Ryan said to your affiant that Paul Sulger was soliciting for prostitutes and that Paul Sulger was a 'Pimp' and that your affiant was told by Colonel Thomas A. Ryan that the reason they were after Paul Sulger was because Mr. Sulger had written to several Arizona Congressmen and President Johnson concerning the unfair competition by Fort Huachuca transportation facilities." (RC 62).

Rex Thornton in the affidavit filed by appellant, alleged:

"That sometime during May, 1965, Colonel Thomas A. Ryan telephoned your affiant concerning the sale of an automobile to a soldier based at Fort Huachuca, Arizona; that during said conversation, Colonel Thomas A. Ryan stated to your affiant that Paul Sulger and his wife were morally unfit and that 'they' were going to put Paul Sulger out of business and that Colonel Thomas A. Ryan told your affiant during said conversation that in a few days 'they' had a big surprise in store for Paul Sulger." (RC 63).

The depositions of William Stone and Rex Thornton were taken by appellees, after notice, on September 9, 1966.

In the deposition of Stone, he stated on page 8 line 22 through page 9 line 24 as follows:

"Q What did you tell Colonel Ryan when he asked you if you'd be a witness at the hearing?

A I told him, 'Anyone subpoenas me, I'll be a witness.' If I was subpoenaed, I'd be a witness.

Q What did he say to that?

A Well, then the conversation went into the—I asked him why, all this and that, what he would need me for, and he said, 'Routine questions.'

Appellee B. H. Pochyla stated:

"Any and all statements that I have ever made concerning Mr. Sulger, his cab drivers and his business were made by me in my official capacity as an officer of the United States Army acting under color and authority of my office as Commanding General, Fort Huachuca, Arizona." (RC 35).

Appellee Thomas A. Ryan stated:

"Any and all statements that I have ever made concerning Mr. Sulger, his cab drivers and his business were made during the investigation, preparation, hearings and trial of the matters related herein, and in my official capacity as Staff Judge Advocate, Fort Huachuca, Arizona and as an officer of the United States Army acting under color and authority of such office and pursuant to directions of my commanding officer, Major General B. H. Pochyla, Commanding General, Fort Huachuca, Arizona." RC 44).

Both appellee Constance Pochyla and appellee Katherine Ryan stated:

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A I told him, 'Anyone subpoenas me, I'll be a witness.' If I was subpoenaed, I'd be a witness.

Q What did he say to that?

A Well, then the conversation went into the—I asked him why, all this and that, what he would need me for, and he said, 'Routine questions.'

Q Well, did the conversation develop any further than that after he told you he was going to ask you routine questions?

A Yes, sir. Then, when I asked him what all the trouble was about—I couldn't understand what all the trouble was about, because he had better equipment than I had when I was the owner of the cab business. Then the Colonel said, 'There wouldn't have been no trouble if he hadn't written all the letters to the Congressmen and the President of the United States, and brought pressure on the General and myself,' and he said, 'We have to take action.' And I asked who he meant by 'we.' He said Mr. Pochyla and himself, because of the pressures that was brought on them. He said, 'You are aware that he is pimping for the girls in Nacco,' and I said, 'No, I was unaware of this.' He said, 'Mr. and Mrs. Sulger are morally unfit to run a business, and we don't need people like that in this area.' " (RC 68).

Thornton in his deposition was read his affidavit by Government's counsel on page 8 lines 14 through 22 and Thornton replied "that's right." Thornton stated he did not believe the statements at page 19 lines 19-20 (RC 67).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. There was no issue of any material fact that as to appellees Jane Doe Pochyla, Jane Doe Ryan, B. H. Pochyla and Thomas A. Ryan so that the Court did not err in granting summary judgment for appellees.

2. The District Court had acquired jurisdiction over the cause by the Removal Petition of Appellees, even though a bond was not filed.

IV.

SUMMARY OF ARGUMENT

1. The District Court acquired jurisdiction of the case by the Removal Petition although no bond was filed since appellant did not raise it in the Court below.

2. The minute entry made by the Clerk on August 10, 1966 denying the Motion for Summary Judgment was a "clerical error."

3. The privilege against suit of federal officers while acting in the discharge of their duties is absolute, and the Motion for Summary Judgment was properly granted, there being no issue of any material fact.

V.

ARGUMENT

1. The District Court acquired jurisdiction of the case by the Removal Petition although no bond was filed since the appellant did not raise it in the Court below.

In Appellant's Motion to Remand and Memorandum of Points and Authorities, (RC 22) appellant makes no mention of the absence of the bond required in a removal of a case from state court to federal court as required by 28 U.S.C.A. 1446(d) in cases in which the petition is not made in behalf of the Government.

In *Nelson v. Peter Kiewit Sons Co.* (DC N.Y. 1955) 130 F.Supp. 59) the United States Attorney had filed the Petition for Removal but made no mention that the Petition for Removal was made at the direction of a department or agency of the United States, but since "the removal statute does not require any such proof to appear in the petition, it

may be made later than the removal, if made with reasonable expedition." *Nelson v. Peter Kiewit Sons Co., supra* at page 65.

In the cases cited by appellant on pages 22 and 23 of his Opening Brief as well as in the Nelson case, the lack of bond was raised by the opposing party in a Motion to Remand or a Motion to Dismiss the Removal Petition. Appellant did not raise this in the Court below.

In *Ayers v. Watson* (1885) 113 U.S. 594 at page 598, 5 S.Ct. 641, 28 L.Ed 1093, in a discussion of the bonding requirements, then Sec. 3 of the Code, the Court stated:

> "By § 3 it is provided that a petition must be filed in the State court before or at the term at which the cause can be first tried, and before the trial thereof, for the removal of the suit into the Circuit Court, and with such petition a bond, with condition, as prescribed in the act. The second section defines the cases in which a removal may be made; the third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record; the directions of the third, though obligatory, may to a certain extent be waived. Diverse State citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Mansfield & Coldwater Railway Co. v. Swan,* 111 U.S. 379. Application in due time, and the proffer of a proper bond, as required in the third section, are also essential *if insisted on,* but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication." (emphasis supplied).

In *Martin v. Baltimore & Ohio Railroad* (1894) 151 U.S. 673 at pages 688-689, 14 S.Ct. 533 at 538, 38 L.Ed 311, the Court stated:

"In *French v. Hay,* 22 Wall. 238, the case had been removed under the act of March 2, 1867, c. 196, (14 Stat. 558,) reenacted in Rev. Stat. § 639, cl. 3, which required the petition to be filed 'before the final hearing or trial' in the state court; the Circuit Court of the United States denied a motion to remand, made, as the report states, because the act 'had not been complied with in respect to time and several other important particulars;' and this court, on appeal, approved its action, and, speaking by Mr. Justice Swayne, said: 'The objection made in the court below touching the removal of the case from the state court, and which objection has been renewed here, was not made in the court below until the testimony was all taken, the case was ready for hearing, and nearly three years had elapsed since the transfer was made. The objection came too late. Under the circumstances it must be held to have been conclusively waived.' And *Taylor v. Longworth,* above cited, was referred to as in point. 22 Wall. 244, 245."

(Cited in *Journal Pub. Co v. General Gas Co.* (9th Cir. 1954) 210 F. 2d 202 at page 204 to the effect that a case not removable when commenced may afterwards become removable.)

It is respectfully submitted the appellant has waived his objection by not raising it in the Court below, and further if the objection had been made then the Government's counsel would then have had the opportunity to place in the record that the Removal Petition was filed at the direction of the Department of Justice acting at the request of the Department of the Army.

2. The minute entry made by the Clerk on August 10, 1966 denying the Motion for Summary Judgment was a "clerical error."

Rule 60(a) Federal Rules of Civil Procedure, Title 28, U.S.C.A. provides in part:

"(a) *Clerical Mistakes*—Clerical mistakes in judgments, orders or other parts of the record and errors

therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

Government's counsel after taking the deposition of Stone and Thornton filed a second Motion for Summary Judgment on January 16, 1967 (RC 76) and lodged a chamber's copy with the Court. The United States District Judge, James A. Walsh, apparently then checked the Docket and found that his written direction to the Clerk to enter an Order granting the Motion for Summary Judgment had been entered as an Order denying it and so on January 17, 1967 entered an Order as follows:

> "It appearing from the file and record in this cause that the court directed the clerk, in writing, on August 10, 1966, to enter an order in this cause that defendants' Motion for Summary Judgment is *granted,* and it appearing further that the clerk erroneously entered an order that defendants' Motion was *denied* and so notified counsel in the case, it is ordered that the clerk forthwith enter, *nunc pro tunc,* as of August 10, 1966, an order that the defendants' Motion for Summary Judgment is granted; and that the clerk forthwith enter judgment in this cause that plaintiff take nothing by his complaint, that the same be dismissed, and that defendants have their costs of suit." (RC 96-97).
>
> The Clerk then entered Judgment for appellees. (RC 82)
>
> Clearly this was a clerical error.

3. The privilege against suit of federal officers while acting in the discharge of their official duties is absolute, and the Motion for Summary Judgment was properly granted, there being no issue of any material fact.

Appellant notes on pages 2-3 of his opening brief that he had filed the Notice of Appeal within the time required

by Rule 73(a) Fed. Rules of Civil Procedure, Title 28 U.S.C.A., in the case of an "officer or agency." If as appellant contends there were slanderous statements outside the scope of privilege, i.e., these statements were not made in the discharge of their duties, then why would appellant take the full sixty days to file the Notice of Appeal.

Appellant makes no argument, with respect to appellees Jane Doe Pochyla and Jane Doe Ryan nor was there any controverting of their affidavits that they knew nothing concerning appellant's affairs.

Appellant argues that appellee B. H. Pochyla's statement is a conclusion of law when he stated any statements made concerning appellant were made while discharging his duties constituted a conclusion of law and therefore no denial was made of the general allegations of the complaint. However, no affidavit was filed concerning General Pochyla having made any statements; only his affidavit cites the acts he directed to be done and he does not recite any statements that he made.

Appellant cannot rely on the allegations of his complaint, which was not verified, to create an issue of fact. Rule 5(e) Federal Rules of Civil Procedure, 28 U.S.C.A. See *Norton v. McShane* (5th Cir. 1964) 332 F. 2d 855 at page 861, where an affidavit of the Attorney General was quoted that at all times set forth in the complaint the defendants were acting in the discharge of their duties. Compare this to the affidavits of Major General L. G. Cagwin (RC 53) and Colonel Robert P. Johnson (RC 57) setting forth the duties of the Commander and Staff Judge Advocate of Fort Huachuca.

(Although the depositions of Thornton and Stone were taken after entry of the nunc pro tunc order and there was no motion for rehearing by appellant based on these depositions, they will be argued herein, despite the appellees' position they are not part of the record.)

The statements as alleged by Stone and Thornton were

only admitted as being uncontroverted for the purpose of the Motion only. (RC 80 lines 3-4)

It can be seen by the affidavits of appellees B. H. Pochyla and Thomas A. Ryan that they are asserting a privilege for acts done under the color of their office. The alleged statement to William Stone by Colonel Ryan was made during investigation by Colonel Ryan for the hearing before the Arizona Corporation Commission. The alleged statements to Rex Thornton and William Stone are shown for the purpose of showing malice on the part of appellee Ryan since neither statement is believed. In *Kelser v. Hartman,* (3rd Cir., 1964) 339 F.2d 597, cert. den. 381 U.S. 934, 85 S. Ct. 1764 14 L.Ed. 2d 969, the tort action was brought for alleged libel and slander and malicious conspiracy to secure his discharge. The Third Circuit, affirming the District Court held the act of defendant were absolutely privileged, even though they were within the outer perimeter of their line of duty as Federal employees. The plaintiff had contended such malice as he alleged destroyed any privilege against suit. The Third Circuit held *Barr v. Matteo* (1959), 360 U.S. 564 79 S.Ct. 1335, 3 L.Ed.2d 1434, controlling and held the suit barred by absolute privilege. In *Camero v. Kostos* (USDC, N.J., 1966), 253 F.Supp. 331, it was stated at page 336:

> "Accepting the mandate in *Keiser,* and applying the standards in *Barr* for sustaining absolute privilege, it cannot fairly be concluded that the defendant did in fact exceed the 'outer perimeter of his line of duty' by his conduct in the performance of such duties with which he was charged by his supervisor and Agency. As pointed out by the Court of Claims, in Camero v. Kostos, supra, where the matter is still pending on an interlocutory remand, it may well be developed that defendant's conduct in regard to his written recommendation to the Depot Commander violated Army Grievance Regulations procedurally, and that such violation, if any, may invalidate the dismissal of defendant from employment. But that

is not the issue presented to this Court on this motion to dismiss, for that alone would be insufficient to dissipate the absolute privilege of immunity from tort suit here. For even then, this would be within the outer perimeter of defendant's line of duty as a zealous prosecutor committed to the establishment of the charge. It is the function of such an advocate to persuade the ultimate adjudicatory department or forum of the justice of his cause. That he may have been motivated by malice, or that he did not find his duty distasteful, or that through over-zealousness he may have exceeded the internal regulations of the Army's Grievance proceedings, nevertheless, such would not destroy the immunity traditionally afforded. Such is deemed to be the law as established by *Barr.* Cf. Norton v. McShane, 332 F.2d 855 (5 Cir. 1964), where an intentional tort complaint for assault by United States Marshal was dismissed."

In Barr v. Matteo, supra, at pages 571 through 573, the Supreme Court quotes with approval Judge Learned Hand in *Gregoire v. Biddle,* 177 F. 2d 579, at page 571:

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand:

'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is

that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . .' *Gregoire v. Biddle,* 177 F. 2d 579, 581.

We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of

cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy."

It is respectfully submitted that in balancing the two interests, i.e., the free exercise of a Federal officer of his duties without fear of damage suits and the redress of damage to a private citizen, that it is better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

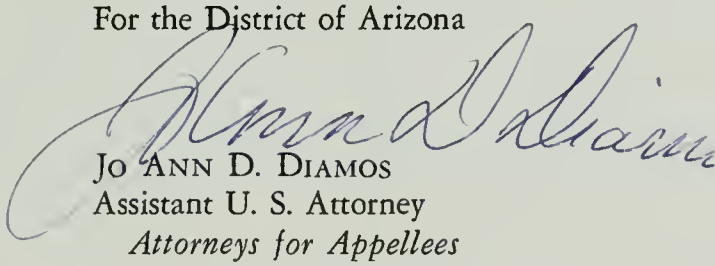
VI.

CONCLUSION

It is respectfully submitted that the District Court had jurisdiction of the cause and properly granted the Motion for Summary Judgment of appellees, there being no material issue of fact.

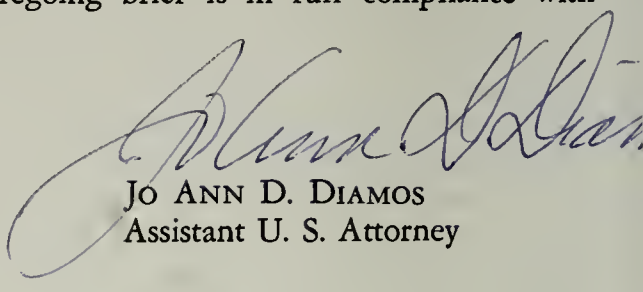
Respectfully submitted,

EDWARD E. DAVIS
United States Attorney
For the District of Arizona



JO ANN D. DIAMOS
Assistant U. S. Attorney
Attorneys for Appellees

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.



JO ANN D. DIAMOS
Assistant U. S. Attorney

Three copies mailed this 21 day of September, 1967, to:

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